

<b>CHARGE OF DISCRIMINATION</b> <small>This form is affected by the Privacy Act of 1974. See enclosed Privacy Act Statement and other information before completing this form.</small>		Charge Presented To: _____ Agency(ies) Charge No(s): _____ <b>EEOC</b>	
_____ and EEOC <small>State or local Agency, if any</small>			
Name (indicate Mr., Ms., Mrs., Miss, Mx., Dr., Hon., Rev., etc.) <b>Ms. Bi Ling Zhu</b>		Home Phone [REDACTED]	Year of Birth [REDACTED]
Street Address, City State and ZIP Code [REDACTED]			
Named is the Employer, Labor Organization, Employment Agency, Apprenticeship Committee, or State or Local Government Agency That I Believe Discriminated Against Me or Others. (If more than two, list under PARTICULARS below.)			
Name <b>Nevada State Board of Massage Therapy</b>		No. Employees, Members <b>15+</b>	Phone No. [REDACTED]
Street Address, City State and ZIP Code <b>1755 E Plumb Ln #252, Reno, NV 89502</b>			
Name _____		No. Employees, Members _____	Phone No. _____
Street Address, City, State and ZIP Code _____			
DISCRIMINATION BASED ON <b>Race, Sex, National Origin</b>		DATE(S) DISCRIMINATION TOOK PLACE <div style="display: flex; justify-content: space-between;"> <span>Earliest <b>11/09/2023</b></span> <span>Latest <b>11/09/2023</b></span> </div>	
THE PARTICULARS ARE (If additional paper is needed, attach extra sheet(s)): <p>1. This charge of race, national origin, and sex-based discrimination alleges a violation of Title VII of the Civil Rights Act of 1964 ("Title VII"), as amended, 42 U.S.C. §§ 2000e et seq. Title VII prohibits employers, defined to include their agents, from discriminating against any individual with respect to their terms, conditions, or privileges of employment because of that individual's race, national origin, or sex, among other protected characteristics. It also prohibits employment agencies from failing or refusing to refer for employment or to otherwise discriminate against any individual based on these same protected characteristics.</p> <p>2. As detailed below, the charging party Bi Ling Zhu ("Zhu"), a Chinese woman, applied for a massage therapy license in 2023 with the Nevada State Board of Massage Therapy ("Board"), an agent of an employer and/or an employment agency under Title VII. The Board denied her application solely because of an arrest and dismissed charge.</p> <p style="text-align: center;"><i>Continued on additional pages</i></p>			
I will advise the agency if I change my address or phone number and I will cooperate fully with them in the processing of my charge in accordance with their procedures.		_____	
I declare under penalty of perjury that the above is true and correct.		_____	
<b>8-7-2024</b> <small>Date</small>		<b>ZHU BI LING</b> <small>Charging Party Signature</small>	

3. Zhu and other would-be massage therapists cannot be lawfully employed in Nevada without a Board-issued license.<sup>1</sup> The Board thus acts as a gatekeeper—exercising absolute control over entry to the field of massage therapy in Nevada.
4. The Board’s policy of considering and/or relying on uncorroborated and dismissed criminal charges in deciding license applications (its “Arrest Records Policy”) causes an unjustified disparate impact on the ability of Asian women to obtain employment as massage therapists in Nevada, in violation of Title VII.
5. The EEOC’s investigation of this charge would align with the EEOC’s Strategic Enforcement Plan, as workers like Zhu are “vulnerable and underserved” in that they are often unaware of their equal employment rights, “may be reluctant or unable to exercise” their rights, and “have historically been underserved by federal employment discrimination protections.”<sup>2</sup> Immigrant women of color like Zhu with limited English proficiency and arrest records are a particularly marginalized, vulnerable, and overlooked category of workers.
6. The EEOC’s investigation of this charge would also be consistent with its long-standing views on third-party liability<sup>3</sup> under Title VII and on criminal records discrimination as a basis for disparate impact liability<sup>4</sup> under Title VII.

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<sup>1</sup> See NEV. REV. STAT. § 640C.910(3) (criminalizing the practice of massage therapy without a Board-issued license).

<sup>2</sup> EEOC Strategic Enforcement Plan 2024–2028, U.S. EQUAL EMP. OPPORTUNITY COMM’N 2, 9–10, [https://www.eeoc.gov/sites/default/files/2024-03/23-161\\_EEOC\\_SEP\\_030124\\_508.pdf](https://www.eeoc.gov/sites/default/files/2024-03/23-161_EEOC_SEP_030124_508.pdf) (last visited July 30, 2024).

<sup>3</sup> See, e.g., *Mobley v. Workday, Inc.*, No. 3:23-cv-00770-RFL (N.D. Cal. Apr. 9, 2024) (EEOC filed amicus brief arguing that a third-party algorithmic screening tool that controls whether applicants can be considered by employers and that acts as an exclusive point of entry for job opportunities qualified it as both an indirect employer and employment agency subject to Title VII); see also U.S. EQUAL EMP. OPPORTUNITY COMM’N, N-917-002, POLICY GUIDANCE: WHAT CONSTITUTES AN EMPLOYMENT AGENCY UNDER TITLE VII, HOW SHOULD CHARGES AGAINST EMPLOYMENT AGENCIES BE INVESTIGATED, AND WHAT REMEDIES CAN BE OBTAINED FOR EMPLOYMENT AGENCY VIOLATIONS OF THE ACT? (1991), <https://www.eeoc.gov/laws/guidance/policy-guidance-what-constitutes-employment-agency-under-title-vii-how-should-charges>; U.S. EQUAL EMP. OPPORTUNITY COMM’N, 915, POLICY STATEMENT ON CONTROL BY THIRD PARTIES OVER THE EMPLOYMENT RELATIONSHIP BETWEEN AN INDIVIDUAL AND HIS/HER DIRECT EMPLOYER (1987), <https://www.eeoc.gov/laws/guidance/policy-statement-control-third-parties-over-employment-relationship-between>.

<sup>4</sup> See Press Release, EEOC, EEOC Sues Sheetz, Inc. For Racially Discriminatory Hiring Practice (Apr. 18, 2024), <https://www.eeoc.gov/newsroom/eeoc-sues-sheetz-inc-racially-discriminatory-hiring-practice>; Press Release, EEOC, Dollar General to Pay \$6 Million to Settle EEOC Class Race Discrimination Suit (Nov. 18, 2019), <https://www.eeoc.gov/newsroom/dollar-general-pay-6-million-settle-eeoc-class-race-discrimination-suit>; see also U.S. EQUAL EMP. OPPORTUNITY COMM’N, 915.002, ENFORCEMENT GUIDANCE ON THE CONSIDERATION OF ARREST AND CONVICTION RECORDS IN EMPLOYMENT DECISIONS UNDER TITLE VII OF THE CIVIL RIGHTS ACT § V.B.2 (2012), <https://www.eeoc.gov/laws/guidance/enforcement-guidance-consideration-arrest-and-conviction-records-employment-decisions=VB2>.

### **The Board's Policy of Denying Licenses to Applicants with Arrest Records**

7. The Board has near total discretion to decide whether to grant licenses.<sup>5</sup> It investigates applicants' arrests in addition to their convictions and has broad authority to do so.<sup>6</sup> Neither the Board's governing statute nor its regulations identify a standard of proof or rules of evidence to apply in application review hearings, nor do they limit use of arrest records in any way.
8. In the absence of any statutory guidance on what to do with the "existence and contents" of arrest records once it uncovers them, the Board routinely uses the existence of an arrest record, even if the charge was dismissed, as evidence of guilt and thus sufficient grounds to deny applications for licensure (the "Arrest Records Policy"). Public records from 2020 through 2024, including Zhu's case, demonstrate that it has repeatedly adhered to this policy.
9. The Board does not dispute its Arrest Records Policy. Indeed, on May 9, 2024, the Board codified the policy, adopting a new regulation that defines engaging in "sexual activity"—one of the statutory grounds for refusal to issue a license—as including "[a]n arrest within the immediately preceding 15 years for any offense related to solicitation, pandering, prostitution or human trafficking."<sup>7</sup>

### **The Board's Denial of Zhu's Nevada Massage Therapy License Because of the Arrest Records Policy**

10. Zhu was licensed as a massage therapist in Nevada from 2016 through early 2020. In May 2019, she was arrested in the spa where she then worked and charged with solicitation, a misdemeanor. She pleaded not guilty, and the charge was dismissed in December 2019 after she completed 25 hours of community service per a diversion agreement with the prosecutor's office. Zhu was never tried for the charge, much less convicted or found guilty. She has always maintained her innocence.

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<sup>5</sup> See NEV. REV. STAT. § 640C.700 (listing 17 statutory grounds on which the Board may deny an application including if an applicant has, in the Board's judgment, engaged in "unethical or unprofessional conduct").

<sup>6</sup> NEV. REV. STAT. § 640C.580(4)(a)(2) (requiring that the Board "[c]onduct an investigation to determine" the "existence and contents" of applicants' arrest records); NEV. REV. STAT. § 640C.750(2) (granting the Board the investigatory powers to administer oaths, examine witnesses, and issue subpoenas).

<sup>7</sup> NEV. STATE BD. OF MASSAGE THERAPY, LCB FILE NO. R128-20, APPROVED REGULATION OF THE BOARD OF MASSAGE THERAPY 40 (2022), available at [https://www.leg.state.nv.us/Register/2020/Register\\_R128-20AP.pdf](https://www.leg.state.nv.us/Register/2020/Register_R128-20AP.pdf) (emphasis added).

11. The Board learned of Zhu's arrest and wrote to her on June 19, 2019, asking for information about it. Zhu faced possible discipline for the arrest and retained counsel to help navigate the administrative process by which the Board evaluates applicants flagged for possible criminal history. In January 2020, the Board agreed to accept Zhu's voluntary surrender of her license in lieu of a disciplinary hearing. The agreement allowed Zhu to reapply for a license after three years and did not constitute an admission of guilt as to the conduct underlying the arrest.
12. Zhu waited three years to reapply for a license to practice massage therapy, the job for which she had successfully trained and previously practiced. In 2023, she submitted a new application for a massage therapy license, including the non-refundable \$510 application fee.
13. The Board submitted Zhu's fingerprints for a background check to the Nevada Department of Public Safety and the FBI Criminal Justice Information Services Division. The background check reports showed the dismissed misdemeanor charge and included no other arrests or convictions.
14. The Board, which knew of Zhu's arrest since June 2019, as it was the basis for the 2020 voluntary surrender, sent her a letter on July 31, 2023, asking for a brief description or written narrative of the dismissed charge as well as court documents reflecting the final disposition. The Board made this request despite knowing the charge had been dismissed four years earlier.
15. The Board sent Zhu a notice in October 2023 that her application could not be administratively approved and that a hearing would be held on November 9, 2023, to consider her "character" or "alleged misconduct." Zhu appeared for the hearing and was represented by an attorney and an interpreter, both at her expense.
16. At Zhu's hearing, the Board examined no witnesses, such as the arresting officer whom Zhu allegedly solicited, nor subpoenaed any documents or witnesses to investigate why Zhu was arrested or why the charge was dismissed. The only evidence the Board considered in deciding Zhu's guilt was the fact of the arrest itself.
17. Ignoring that Zhu's arrest had been dismissed almost four years earlier and that no evidence corroborated the allegations underlying the arrest, the Board concluded that Zhu was guilty as charged. It denied her application on the following grounds:

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- Nev. Rev. Stat. § 640C.700(4) and (9) (that she “engaged in or solicited sexual activity during the course of practicing massage” and “in the judgment of the Board, engaged in unethical or unprofessional conduct”); and
  - Nev. Admin. Code § 640C.410(1)(a) (defining “unethical or unprofessional conduct” to include “[o]ffering to practice massage therapy . . . on a client in exchange for sexual favors”).
18. As a result of the Board’s Arrest Records Policy, Zhu, along with dozens of other Asian women, has been barred from practicing the profession for which she has successfully trained and previously practiced in Nevada. She previously earned about \$6,000 per month as a massage therapist. She now earns about \$900 per month as a caretaker for her elderly mother. If she were licensed, she would be seeking to work full-time as a massage therapist.

**The Board’s Arrest Records Policy Has an Unjustified Disparate Impact on Asian Women, in Violation of Title VII**

19. Title VII defines “employer” as “a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, *and any agent of such a person.*”<sup>8</sup>
20. Title VII prohibits “employer[s]” from discriminating against “any individual” with respect to their “compensation, terms, conditions, or privileges of employment,” because of, among other characteristics, such individual’s race, sex, or national origin.<sup>9</sup> By constraining employers in their dealings with “any individual,” not just employees, Title VII expressly reaches beyond the direct employer-employee relationship.
21. This breadth was intentional. Congress sought to achieve equality of employment opportunities by, among other things, ensuring equal access to the job market. In addition to barring “employer[s]” from discriminating against “any individual,”<sup>10</sup> it constrains third parties like employment agencies.

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<sup>8</sup> 42 U.S.C. § 2000e(b) (emphasis added).

<sup>9</sup> *Id.* § 2000e-2(a)(1).

<sup>10</sup> *Id.*

22. Title VII broadly defines “employment agency” as “any person regularly undertaking with or without compensation to procure employees for an employer or to procure for employees opportunities to work for an employer and includes an agent of such a person.”<sup>11</sup> An employment agency violates Title VII when it “fail[s] or refuse[s] to refer for employment, or otherwise . . . discriminate[s] against” any individual because of race, sex, or other protected characteristics.<sup>12</sup>
23. Long-standing<sup>13</sup> and recent<sup>14</sup> precedent and EEOC guidance<sup>15</sup> acknowledge Title VII’s breadth and how third parties outside the immediate employer-employee relationship can unlawfully interfere with relationships between an individual and their would-be employer. The Board is one such third party—acting both as an “agent” of the state of Nevada and as an “employment agency.”
24. As a licensing agency created by the Nevada legislature<sup>16</sup> and subject to the governor’s control,<sup>17</sup> the Board is an agent of the state of Nevada,<sup>18</sup> which is an “employer” under Title VII. Through its Arrest Records Policy, the Board has denied Zhu equal access to the job market and thus unlawfully interfered with her employment opportunities with Nevada massage therapy businesses.

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<sup>11</sup> *Id.* § 2000e(c).

<sup>12</sup> *Id.* § 2000e-2(b).

<sup>13</sup> *See Sibley Mem'l Hosp. v. Wilson*, 488 F.2d 1338 (D.C. Cir. 1973).

<sup>14</sup> *See, e.g., Mobley v. Workday, Inc.*, 3:23-cv-00770-RFL (N.D. Cal. July 12, 2024) (partially denying motion to dismiss on grounds that the defendant, a third-party company that uses an algorithm to screen job applications, was plausibly an “agent” of would-be employers and thus subject to Title VII).

<sup>15</sup> POLICY STATEMENT ON CONTROL BY THIRD PARTIES OVER THE EMPLOYMENT RELATIONSHIP BETWEEN AN INDIVIDUAL AND HIS/HER DIRECT EMPLOYER, *supra* note 4.

<sup>16</sup> *See* NEV. REV. STAT. § 640C.150(1).

<sup>17</sup> *Id.* §§ 640C.150(2), (7).

<sup>18</sup> *Woodard v. Virginia Bd. of Bar Examiners*, 420 F. Supp. 211, 213 n.3 (E.D. Va. 1976), *aff'd*, 598 F.2d 1345 (4th Cir. 1979); *Owens v. Rush*, 636 F.2d 283 (10th Cir. 1980).

25. In addition to being an agent of the state of Nevada and thus subject to Title VII as an “employer,” the Board is an “employment agency” under Title VII. It regularly undertakes to procure employees for employers of massage therapists and opportunities to work for would-be massage therapists. For employers, the Board evaluates and determines the qualifications and fitness of potential massage therapists;<sup>19</sup> issues licenses to those it deems qualified to practice massage therapy;<sup>20</sup> and identifies all such licensees on its website and elsewhere.<sup>21</sup> The Board thus brings about a list of qualified massage therapists for employers to consider for employment. For would-be massage therapists, the Board provides a license without which they cannot lawfully work as a massage therapist. Indeed, if a would-be therapist practices massage therapy without a Board-issued license, they will be found guilty of a misdemeanor.<sup>22</sup> Thus, through its licensing scheme, the Board provides an opportunity to work for an employer of massage therapists. The Board’s control over these employment opportunities is not theoretical. In some cases, licensees operating under a probationary license must request permission by the Board to work for specific employers, and the Board can and has rejected such requests.

26. The Board’s Arrest Records Policy has a disparate impact on Asian women, in violation of Title VII.

27. Ms. Zhu’s counsel, the American Civil Liberties Union (“ACLU”), has reviewed four years of publicly available records in its investigation of the Board. Based on this review, between January 2020 and January 2024, fifty-five women applicants appeared before the Board whose applications were decided after consideration of an arrest record and dismissed charge, as distinguished from a conviction record.

a. Nine applicants were white. Of these, six were granted probationary or regular licenses. Thus, the selection rate for white women applicants in this group was 66% (six of nine).

b. Forty-one applicants were Asian. Of these, eleven were granted probationary or full licenses. Their selection rate was thus 26% (11 of 41).<sup>23</sup>

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<sup>19</sup> NEV. REV. STAT. §§ 640C.300(3)–(4).

<sup>20</sup> *Id.* § 640C.300(5).

<sup>21</sup> *Id.* § 640C.310(1) (requiring the Board to prepare and maintain separate lists of persons issued a license; applicants for a license; and persons whose licenses have been revoked or suspended by the Board; and obligating the Board to disclose the information in these lists for a nominal fee, at most); *see also* *Verify License*, NEV. STATE BD. OF MESSAGE THERAPY, <https://online.nvmassagebd.com/ui/search.aspx> (last visited July 30, 2024) (providing free online service to verify a license with name and license number).

<sup>22</sup> NEV. REV. STAT. § 640C.910(3) (“A person who violates any provision of this section is guilty of a misdemeanor.”).

<sup>23</sup> Of the remaining five applicants, one was a Black woman who was granted a license. The race of the remaining four applicants is presumed to be non-Asian but is otherwise uncertain. All four were granted probationary or full licenses.

28. Thus, the selection rate between January 2020 and January 2024 for applicants to whom the Board applied its Arrest Records Policy was 26% for Asian women and 66% for white women. These statistics do not account for those Asian women who may have been discouraged from applying for licenses altogether because of the Board's Arrest Records Policy.
29. "Under the Equal Employment Opportunity Commission's four-fifths rule, a selection practice is considered to have a disparate impact if it has a 'selection rate for any race, sex, or ethnic group which is less than four-fifths . . . (or eighty percent) of the rate for the group with the highest rate.'" <sup>24</sup> Here, the selection rate for Asian women as compared to white women fails the EEOC's four-fifths rule. <sup>25</sup> The selection rate for Asian women (26%) divided by the selection rate for white women (66%), i.e., 26/66, is approximately 39%. Because 39% is less than 80%, the Board's Arrest Records Policy causes a disparate impact on the basis of race, acutely harming Asian women applicants.
30. The Board's Arrest Records Policy is neither job related nor consistent with business necessity. EEOC guidance specifies that, to satisfy the business necessity element, when reviewing a job applicant's criminal history, including arrest records, the entity must first gather and consider evidence other than an arrest itself that the alleged conduct underlying the arrest occurred. <sup>26</sup> Once it has obtained such evidence, it must provide an individualized review to meaningfully assess that alleged conduct, including (1) the nature and gravity of the alleged conduct; (2) how much time has passed since the alleged conduct occurred; and (3) whether the alleged conduct is relevant to the job at issue. <sup>27</sup>
31. The ACLU's review of the Board's record reveals that, rather than examining the factors detailed above, the Board routinely credits the mere existence of an arrest record as evidence of guilt sufficient to deny an application for licensure. As explained by one Board member at a June 7, 2023 hearing about another Asian applicant, "none of [our licensees] get within sniffing distance of an arrest . . . Just [an] arrest tells me that something was going on that shouldn't have been happening." Such a practice falls far short of the EEOC's standard for job-relatedness or business necessity.

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<sup>24</sup> See *Guerrero v. California Dep't of Corr. & Rehab.*, 701 F. App'x 613, 617 (9th Cir. 2017) (citation omitted).

<sup>25</sup> 29 C.F.R. § 1607.4(D) ("Adverse impact and the 'four-fifths rule.' A selection rate for any race, sex, or ethnic group which is less than four-fifths (4/5) (or eighty percent) of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence of adverse impact[.]").

<sup>26</sup> ENFORCEMENT GUIDANCE ON THE CONSIDERATION OF ARREST AND CONVICTION RECORDS IN EMPLOYMENT DECISIONS UNDER TITLE VII OF THE CIVIL RIGHTS ACT, *supra* note 5, at § V.B.2.

<sup>27</sup> *Id.* §§ V.B.6a-c.



**Harm to Charging Party Zhu and Requested Relief**

32. As a result of the Board's discriminatory Arrest Records Policy, Zhu has been barred in Nevada from practicing the profession for which she has successfully trained, and for which she is otherwise qualified. Her income has dropped significantly since she was a licensed therapist, and she has suffered emotional distress due to the license denial.
33. Through this charge, Zhu, individually and on behalf of all others similarly situated as a class and/or subclasses, seeks all injunctive, equitable, legal, monetary, punitive, and/or other forms of relief or damages that are available under Title VII.

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